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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, NOVEMBER 26, 2002

APPLICATION OF

THE CITY OF BRISTOL

CASE NO. PUC-2002-00126

For a certificate of public
convenience and necessity to
provide local exchange
telecommunications services
and for interim operating
authority

ORDER GRANTING CERTIFICATE

On August 5, 2002, the City of Bristol d/b/a Bristol Virginia Utilities Board ("Bristol" or "Applicant"), completed an application with the State Corporation Commission ("Commission") for a certificate of public convenience and necessity to provide local exchange telecommunications services in the cities of Bristol and Norton and the counties of Washington, Scott, Lee, Wise, Russell, Tazewell, Smyth, and Grayson; and for interim operating authority to operate as a local exchange carrier. The initial application filed by Bristol on July 1, 2002, was amended on July 8, July 19, and July 25, 2002, and was completed on August 5, 2002.

On August 12, 2002, Central Telephone Company of Virginia and United Telephone-Southeast, Inc. (jointly, "Sprint"), filed a Notice of Participation and an objection to Bristol's request for interim operating authority.

By Order dated August 16, 2002, the Commission directed the Applicant to provide notice to the public of its application, directed the Commission Staff to conduct an investigation and file a Staff Report, and established a procedural schedule. The August 16, 2002, Order also denied Bristol's request for interim operating authority.

On August 21, 2002, Verizon Virginia Inc. and Verizon South Inc. (jointly, "Verizon") filed a Notice of Participation.

On August 21, 2002, Bristol filed a Motion for Reconsideration of Interim Authority. On August 21, 2002, the Commission issued an Order granting reconsideration of its decision denying interim authority and scheduling subsequent pleadings on Bristol's motion. On August 30, 2002, Sprint and Verizon filed responses to Bristol's motion stating that interim authority should not be granted. Bristol filed a reply on September 6, 2002. On September 27, 2002, the Commission issued its Order Permitting Limited Operating Authority. The Commission's Order granted Bristol "limited interim operating authority to provide service to its existing commercial customer, which it began serving prior to March 1, 2002."

Bristol filed proof of publication and proof of service on September 11, 2002,¹ as required by the August 16, 2002, Order. On September 13, 2002, the Virginia Cable Telecommunications Association ("VCTA") filed a Notice of Participation.

On September 19, 2002, Charter Communications Inc. ("Charter") filed a Notice of Participation. In its notice, Charter stated that it "offers for sale to the public communications services, including telecommunications services, in the proposed service territory of the City of Bristol" and requested that the Commission schedule a hearing on the matter to allow for cross-examination by private competitors such as Charter.

Pursuant to the August 16, 2002, Order, comments were to be filed by interested parties on or before October 3, 2002. On September 26, 2002, Sprint filed a Motion for an Extension of Time and Motion for a Protective Order. On September 27, 2002, VCTA filed a Motion to Compel and Motion for Extension of October 3 Deadline. On September 30, 2002, Charter filed a Motion in Support of VCTA's Motion for an Extension of October 3 Comment Deadline. On September 27, 2002, Bristol filed a Motion for a Protective Order. On October 1, 2002,

¹ The individual Publication Affidavits were filed on September 18, 19, and 26, 2002.

Charter filed a Supplement to its September 27, 2002, motion. On October 1, 2002, Bristol filed a Response to the Motions of Charter, VCTA and Sprint. On October 2, 2002, the Commission issued its Order on Motions for Extension, granting an extension of the comment period for interested parties until October 10, 2002.

On October 1, 2002, Hearing Examiner Michael D. Thomas issued his ruling granting Bristol's Motion for Protective Order. On October 2, 2002, Hearing Examiner Thomas issued his ruling granting VCTA's Motion to Compel.

On October 10, 2002, Sprint, Verizon, Charter, and VCTA filed comments. Sprint, Charter, and VCTA requested a hearing. MountaiNet Telephone Company and KMC Telecom, two competitive local exchange carriers, filed letters in support of Bristol's application. In addition, over 450 letters from the public supporting Bristol's application were filed.

On October 22, 2002, Bristol filed a response to the requests for hearing and a motion to separate the certification proceeding if the Commission deems that a hearing is appropriate. On October 28, 2002, VCTA filed a reply to Bristol's response and motion. On October 31, 2002, Sprint filed a response to Bristol's motion. On November 6, 2002, Charter filed a reply to Bristol's motion.

On October 22, 2002, the Staff filed its Motion for Extension to File Staff Report requesting an extension from October 28, 2002, to November 1, 2002. On October 25, 2002, the Commission issued its Order Extending the Time for Filing Staff's Report granting Staff's request.

On October 31, 2002, the Staff filed its Report finding that Bristol's application was in compliance with the Rules Governing the Offering of Competitive Local Exchange Telephone Service, 20 VAC 5-400-180. Based upon its review of Bristol's application, the Staff determined that it would be appropriate to grant the Company a certificate to provide local exchange telecommunications services, subject to the following condition: The Staff recommended that, if Bristol collects customer deposits, it shall, prior to collecting any deposits, establish and maintain an escrow account for such funds, held in a Virginia office of a duly chartered state or national bank, savings and loan association, savings bank, or credit union that is unaffiliated with the City of Bristol, and shall notify the Division of Economics and Finance of the escrow arrangement at its inception and any subsequent change to the arrangement. The Staff further recommended that any escrow arrangement established pursuant to this requirement shall be maintained until such time as the Staff or the Commission determines it is no longer necessary.

On November 7, 2002, Bristol filed a response to comments of other parties and in support of the Staff Report. On November 12, 2002, Sprint filed a reply to Bristol's response to the Staff Report.

NOW UPON CONSIDERATION of the Application, Staff Report, pleadings, and the applicable law, the Commission finds as follows. We grant Bristol a certificate to provide local exchange telecommunications services in the cities of Bristol and Norton and the counties of Washington, Scott, Lee, Wise, Russell, Tazewell, Smyth, and Grayson.²

The Applicant has shown, pursuant to § 56-265.4:4 B 1 of the Code of Virginia ("Code"), that it possesses sufficient technical, financial, and managerial resources. Section 56-265.4:4 B 1 of the Code also states as follows:

Before granting any such certificate, the Commission shall: (i) consider whether such action reasonably protects the affordability of basic local exchange telephone service, as such service is defined by the Commission, and reasonably assures the continuation of quality local exchange telephone service; and (ii) find that such action will not unreasonably prejudice or disadvantage any class of telephone company customers or telephone service providers, including the new entrant and any incumbent local exchange

² The Applicant's service area includes any towns that may be located within the counties listed above. See Application of the City of Danville d/b/a Danville Department of Utilities, For certificates of public convenience and necessity to provide local exchange telecommunications services, Case No. PUC-2002-00128, Final Order (Nov. 1, 2002) ("City of Danville").

telephone company, and is in the public interest. (Emphasis added.)

In this regard, we have considered whether granting a certificate reasonably protects the affordability of basic local exchange service and reasonably assures the continuation of quality local exchange telecommunications services, and find that these considerations support granting a certificate. In addition, we find that granting a certificate will not unreasonably prejudice or disadvantage any class of telephone company customers or telephone service providers, including the new entrant and any incumbent local exchange telephone company, and is in the public interest.

Respondents in this case assert, among other things, that the Commission cannot grant a certificate until Bristol demonstrates actual compliance with other statutory provisions, such as §§ 56-265.4:4 B 4 and 15.2-2160 of the Code. Respondents contend that the Commission must find that Bristol will be in full compliance with these other statutory mandates at the moment of certification. For example, Sprint states that the Commission must affirmatively make determinations under § 56-265.4:4 B 4 of the Code prior to granting a certificate. Based on the plain reading of the Code, these assertions are misplaced; the statute contains no such prerequisites.

To the contrary, the Code explicitly directs, in § 56-265.4:4 B 1, what the Commission must consider and find "[b]efore granting any such certificate" (emphasis added). In contrast, § 56-265.4:4 B 4 of the Code imposes obligations on Bristol that take effect "[u]pon the Commission's granting of a certificate" (emphasis added).³ The statute is unambiguous on what the Commission must consider and find "before" a certificate is issued. We will not create additional statutory prerequisites for obtaining a certificate.⁴

Respondents also contend that telephone service providers will be unreasonably prejudiced or disadvantaged if Bristol, after obtaining a certificate, violates §§ 56-265.4:4 B 4 and 15.2-2160 of the Code. For example, respondents state that Bristol could rapidly capture customers and displace all local exchange carriers if Bristol offers service at predatory prices or illegally subsidized rates. In accordance with § 56-265.4:4 B 1, however, we find that the action of issuing

³ Similarly, § 15.2-2160 of the Code does not require the Commission to make any findings thereunder prior to issuing a certificate. This section, among other things, places obligations on a locality "that has obtained a certificate." See Va. Code §§ 15.2-2160 B and C. In addition, § 15.2-2160 D places restrictions on the "prices charged and the revenue received by a locality." Contrary to § 56-265.4:4 B 1, however, the Code does not direct the Commission to make any findings under § 15.2-2160 prior to issuing a certificate.

⁴ Indeed, in City of Danville, we issued a certificate to the City of Danville pursuant to the same statutory requirements as those under which Bristol has applied. In that case, as here, we did not require the City of Danville to demonstrate actual compliance with §§ 56-265.4:4 B 4 and 15.2-2160 of the Code prior to granting the certificate.

a certificate will not unreasonably prejudice or disadvantage telephone service providers.

Rather, upon receiving a certificate, Bristol must comply with all applicable laws, including §§ 56-265.4:4 B 4 and 15.2-2160 of the Code. Respondents allege that Bristol has and/or will violate these statutory requirements. The possibility that Bristol or its yet-to-be-filed tariffs may not comply with §§ 56-265.4:4 B 4 or 15.2-2160 does not, under the Code, unreasonably prejudice or disadvantage telephone service providers. The possibility of noncompliance with §§ 56-265.4:4 B 4 or 15.2-2160, subsequent to receiving a certificate, is part of the statutory scheme established in the Code.

In granting a certificate, we are not approving rates. Bristol has filed illustrative tariffs and attested to its intent to comply with all statutory and regulatory requirements that attach upon receiving a certificate. Prior to providing service under the certificate issued today, Bristol must submit tariffs to the Commission's Division of Communications that conform to all applicable rules and regulations.⁵ Any alleged noncompliance with the above

⁵ We direct Bristol contemporaneously to serve upon the service list for this case a copy of those tariffs. Absent subsequent order of the Commission, such tariffs may become effective a minimum of 30 days after being submitted to the Division of Communications.

statutes may be brought before the Commission pursuant to any means provided by existing statutes and regulations. Again, this is the sequence of events resulting from the statutory scheme found in the Code.

We also reject respondents' contention that the Commission must adopt new rules or safeguards prior to granting the certificate herein.⁶ We fully expect Bristol, or any other local exchange carrier that currently has or will obtain a certificate, to comply with the Code and the Commission's existing subsequently adopted rules. On October 15, 2002, in Case No. PUC-2002-00115, the Commission issued an Order for Notice and Comment and/or Requests for Hearing on Proposed Rules. The proposed rules include new regulatory standards and safeguards pursuant to § 56-265.4:4 of the Code. The Code, however, does not require the Commission to promulgate new rules or safeguards prior to issuing any new certificate. In addition, we find that we can make the statutory determinations necessary, in order to grant the certificate herein, without new rules or safeguards.

Respondents also request a hearing. Section 56-265.4:4 B 1 permits the Commission to grant a certificate to

⁶ This is consistent with our finding in City of Danville.

Bristol "following an opportunity for hearing."⁷ Accordingly, our Order for Notice and Comment, dated August 16, 2002, provided for respondents to submit hearing requests and precise statements of why a hearing should be conducted. Based on the pleadings and our findings above, we reject the respondents' requests for hearing. The respondents have not raised any matters that warrant a hearing as to the granting of a certificate under § 56-265.4:4 B 1 of the Code. The issues raised by respondents primarily relate to concerns that arise after a certificate is granted. Further, respondents request a hearing on matters related to the Applicant's compliance with §§ 56-265.4:4 B 4 or 15.2-2160 of the Code. As found above, however, such matters are outside the scope of what we must consider and find prior to granting a certificate.⁸

Bristol requests a service territory based on the following provision in § 15.2-2160 A of the Code: "Any locality providing telecommunications services on March 1, 2002, may provide such services within any locality within

⁷ This statute does not mandate a hearing upon request. Rather, a party requesting a hearing may be required to establish the reasons why a hearing is necessary. Compare, e.g., Va. Code § 56-46.1 C ("If, prior to such approval, any interested party shall request a public hearing, the Commission shall . . . hold such hearing . . .").

⁸ Finding that a hearing is not required in this proceeding, we do not reach Bristol's Motion to Separate Certification Proceeding If the Commission Deems Hearing Appropriate.

seventy-five miles of the geographic boundaries of its electric distribution system as such system existed on March 1, 2002." Bristol was providing service to one commercial customer on March 1, 2002. In Sprint's comments, however, it asserts that Bristol was not lawfully providing telecommunications services on March 1, 2002, and does not satisfy this statutory provision. Specifically, Sprint states that as of March 1, 2002, no state statute gave Bristol authority to offer telecommunications services. Sprint also states that Bristol failed to add lawfully such authority to its charter subsequent to the May 2001 federal court decision, which found that a Virginia statute prohibiting Bristol from providing certain telecommunications services was preempted by federal law.⁹

In response, Bristol states that it timely amended its charter but inadvertently did not submit the same to the General Assembly during the 2002 Session. Bristol also asserts, as did the federal court in City of Bristol v. Earley, that §§ 15.2-2109 and 56-265.1 of the Code authorized Bristol to provide telecommunications services on March 1, 2002.

We reject Sprint's objection to Bristol's requested service territory. Based on the record before us, we find

⁹ City of Bristol v. Earley, 145 F.Supp.2d 741 (W.D. Va. 2001).

that Bristol was providing "telecommunications services" on March 1, 2002, in accordance with § 15.2-2160 A of the Code. Furthermore, although not relied upon by Bristol, we note that it began furnishing telecommunications services to its government offices, city schools, and itself in September 2000 and that it was providing such telecommunications services on March 1, 2002.

Finally, we reject Charter's request that Bristol comply with the affiliate transaction requirements of § 56-77 of the Code. As explained in the Staff Report, no other competitive local exchange carrier is subject to this section of the Code, and a majority of the incumbent local exchange carriers subject to this section do not file for approval of affiliate transactions due to a high exemption threshold. We find that imposing § 56-77 upon Bristol at this time would result in an unnecessary burden on the Applicant.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) Bristol is hereby granted a certificate of public convenience and necessity, No. T-598, to provide local exchange telecommunications services in the cities of Bristol and Norton and the counties of Washington, Scott, Lee, Wise, Russell, Tazewell, Smyth, and Grayson.

(2) Should Bristol collect customer deposits, it shall, prior to collecting any deposits, establish and maintain an

escrow account for such funds, to be held in a Virginia office of a duly chartered state or national bank, savings and loan association, savings bank, or credit union that is unaffiliated with the City of Bristol, and shall notify the Commission's Division of Economics and Finance of the escrow arrangement at its inception and any subsequent change to the arrangement. Any escrow arrangement established pursuant to this requirement shall be maintained until such time as the Staff or Commission determines it is no longer necessary.

(3) Bristol shall provide tariffs to the Commission's Division of Communications that conform to all applicable rules and regulations before it begins offering local exchange telecommunications services. Bristol shall contemporaneously serve upon the service list for this case a copy of those tariffs.

(4) This case shall be dismissed and removed from the list of pending cases.